19379

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

SAMUEL M. DAMON,
Plaintiff in Error,
vs.
THE TERRITORY OF HAWAII,
Defendant in Error.

No. 207.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

A certain tract of land in Hawaii, known as Ahupuaa of Moanalua, in the Island of Oahu, had for many years been the property of the plaintiff in error and those under whom he claims. In the year 1862, it was the property of Kamehameha IV (Record, p. 7), passing upon his death to his brother Kamehameha V, otherwise known as Lot Kamehameha, from whom it descended to Ruth Keelikolani as sole heir, who devised it to Bernice Pauahi Bishop, who in turn devised it to the plaintiff in error

(Record, p. 17). The title was confirmed by royal patent No. 7858, which, after describing the tract by metes and bounds, courses and distances, adds: "There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows," followed by a specific description of the territory covered by the fishing right.

Under the fishery laws of Hawaii, passed in 1839, amended in 1841 and in 1846 (Laws of the Hawaiian Islands, Vol. I, pp. 90 *et seq.*), which acts are summarized in the petition of the plaintiff in error at p. 12 of the Record, the landlord's fishing right consisted in the privilege of naming one fish, which fish, by whomsoever taken, should belong to him exclusively; or, in lieu of such exclusive right to a particular fish, he was empowered to prohibit all fishing upon his fishing grounds during certain months of the year, and to receive from the fishermen one-third of all fish taken during the fishing season. These fishing rights were asserted and enjoyed by the owners of the tract of land in question, from Kamehameha IV down to the plaintiff in error (Record, pp. 6–10), being exercised by the latter until the right was terminated under the provisions of Section 95 of the Organic Act of Hawaii, after the annexation, repealing all laws which conferred exculsive fishery rights, "subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act, unless established," the method of their establishment being provided by Section 96 of the Organic Act.

In accordance with the provisions of Section 96, the plaintiff in error instituted suit in the court below to establish his exclusive right of fishery within the metes and bounds described in the petition. The title of plaintiff in error to the land was admitted (Record, p. 17), and the only question in the case was, whether the fishing right in the adjoining sea, attached to the land was a vested right. The court below held that it was not, and from its judgment the present writ of error is taken.

Assignments of Error.

The learned court below erred :

I. In holding that plaintiff was properly nonsuited in the circuit court.

II. In holding that no title to, or property in, the fishery passed to the plaintiff in error and those under whom he claims, by virtue of royal patent No. 7858.

III. In holding that plaintiff in error had no vested right in his sea fishery, under the laws of Hawaii, and

IV. In holding that the plaintiff's rights in the sea fishery were terminated, without any right to compensation therefor, under the provisions of the Organic Act.

Points and Authorities.

Section 95 of the Organic Act provides: "That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are herby repealed, and all fisheries in the sea waters of the Territory of Hawaii, not included in any fish pond or artificial enclosure, shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act, unless established as hereinafter provided."

The proceedings below were to establish a vested right in the plaintiff in error, in and to his right of fishery, pursuant to the procedure provided by Sec. 96 of the Act. The controversy presents, practically, the single question whether or not the plaintiff had a vested right in the fishery declared by the royal patent to be attached to his land.

In the support of the affirmative of this proposition, the plaintiff presents four grounds for his claims, namely :

I. The Code of Laws accompanying the Constitution of 1839, in terms, recognized and confirmed a vested right in and to the fishery in controversy.

II. Sec. II, Chap. VI, Art V, of the Hawaiian Act of 1846, provides, in terms, that such fishing ground shall be considered the private property of the landlords.

III. By royal patent No. 7858, a vested right thereto was granted.

IV. The duration and character of his possession entitles plaintiff to the presumption of a grant.

I.

An examination of the "Principles adopted by the Board of Commissioners to Quiet Land Titles, in their adjudication of claims presented to them," (Laws of the Hawaiian Islands, Vol. II, pp. 81 *et seq.*,) which principles were enacted into law (Id. p. 94), discloses the fact that, prior to 1840, lands were held by tenures somewhat similar to the English feudal system, no tenant holding an allodial title. As declared in the opinion of the learned court below, (Record, p. 33), the king was the universal lord and original proprietor of all the lands in his kingdom, and the source of title, with power to grant fisheries if he desired to do so.

In 1840, however, the King, in conjunction with the chiefs and nobles, promulgated a Declaration of Rights, Constitution and Code of Laws, known as the Constitution of 1839, providing, among other things, that "protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws." Chap. 3, Sec. 8 of the Code of Laws provided: "His majesty, the King, hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself. These are the fishing grounds which his Majesty the King takes and gives to the people: The fishing grounds

without the coral reef, viz.: the Kilohee grounds, the Lohee ground, the Malolo ground, together with the ocean beyond. But the fishing ground from the coral reefs to the sea beach are for the landlords, and for the tenants of their several lands, but not for others." The testimony in this case shows that the fishery here in controversy was held and enjoyed as landlord fishing grounds under this provision of the Code. (Record, pp. 7-10).

The Code thereupon further provides: "If there be a variety of fish on the ground where the landlord taboos his particular fish, then the tenants of his own land may take them, but not the tenants of other lands, lest they take also the fish tabooed by the landlord. The people shall give to the landlord one-third of the fish thus taken." In the case at bar, the landlord's fish was the mullet, and the right of taking other fish was confined to the tenants of the landlord's land, who gave him one-third of the fish taken, the tenants of other lands not being allowed to take fish at all within the territory covered by the fishery right.

In considering the effect of these statutes, by which the King took the fishing grounds from those who now possess them, and, in lieu thereof, gave to the landlords the rights above specified, the court below says: "It is argued that these statutes are in the nature of grants and are sufficient to vest title to the fisheries in the landlords, and that the word 'give,' used in the act of 1839, is a word of conveyance, and was sufficient to pass title to the fisheries from the King to the konohiki (landlord), and that the title so conveyed became a vested right within the meaning and intent of Sec. 95 of the Organic Act. We do not agree with this contention. Aside from the absence of definite description of the alleged subject of the grant, and the absence of a definite grantee, the statutes themselves bear conclusive evidence that they were not intended as grants of property, and that they were not intended to be

more than appears from their plain terms, to wit, grants of special privileges to persons who then were or might become landlords."

It will be observed that the Court below bases its rejection of the plaintiff's claim upon three grounds, namely :

(a) Absence of definite description of the alleged subject of the grant,

(b) Absence of proper words of grant, and

(c) Absence of a definite grantee.

We respectfully submit that, particularly in such a case as the present, with its peculiar attending circumstances, the doctrine expressed by this court in Miles *et al. vs.* St. Clair County *et al.*, 8 How., 569, 581, is specially applicable: "If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant, if, in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted."

The learned court's rejection of the plaintiff's claim, upon the grounds assigned by it, fails to take into account the fact that these are grants by the Government, which can be made in any language the granting power may see fit to employ, and that the rules of the common law as to conveyances between private parties are not applicable. The sovereign being supreme, its power to make grants in any terms which will give expression to its purpose is likewise supreme and unlimited, public and private grants differing very materially in these respects.

"It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent

should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties." Railway Co. *vs.* Railway Co., 97 U. S., 491, 497.

"The fault of this reasoning is that it seeks to apply the principles which relate to common law grants between private persons to an act of the legislature, which differs from a grant of a private person in that it is both a grant and a law; and, as such, the intent of the law is to be kept in view, and its purpose effectuated, whenever the subject matter of the grant comes in controversy; and that construction must be placed upon it which will preserve and carry out the object of the legislature, however such construction may conflict with the principles of the common law, or prevent the attachment of equities which would spring from transactions between private parties. (Citations.)" Railroad Co. *vs.* Davison, 65 Mich., 416, 430.

"The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance." Winona & St. Peter Railroad Co. *vs.* Barney, 113 U. S., 618, 625; United States *vs.* Railway, 150 U. S., 1, 14; Barden *vs.* N. P. R. R., 154 U. S. 288, 326; Wisconsin Central R. R. Co. *vs.* Forsythe, 159 U. S., 46, 55; Sioux City R. R. *vs.* U. S., 159 U. S., 349, 360; United States *vs.* Oregon &c. R. R., 164 U. S., 526, 539; Shaw *vs.* Kellogg, 170 U. S., 312, 331; Oates *vs.* National Bank, 100 U. S. 239, 244; State *vs.* Smith, 40 Ark., 341; Smith *vs.* Pipe, 8 Colo. 187, 196-7.

In Nash *vs.* Sullivan, 29 Minn., 206, 214, land had been granted to a railroad company under a State act, passed prior to the Act of Congress upon which the State's title depended; and it was urged, in opposition to the grant to the railroad,

that grants made by legislatures are not warranties, and that, therefore, if the thing granted was not in the grantor at the time of the grant, no estate passed to the grantee, citing Rice *vs.* Railroad Co., 1 Black, 358, as authority for the proposition contended for. But the court said: "If an act of the legislature be considered merely as a grant, this doctrine would, undoubtedly, be sound. But it is always to be born in mind, in construing a legislative grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of the legislature. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties."

Where a legislative grant is of a certain number of square leagues, to be located within a certain district, which grant would have been void in a conveyance by private persons for indefiniteness and uncertainty, the grant is good, and the delivery of possession within the district renders the title complete, and defines the location of the grant. Pinkerton *vs.* Ledoux, 129 U. S., 346, 354; Foss *vs.* Hinkell, 91 Cal., 194 199. *A fortiori*, in a case like the present, where, although no exact description be given, the provision that "from the coral reefs to the sea beach are for the landlords and for the tenants of their several lands, but not for others," is of a character so definite that the subject of the grant is clearly defined, we respectfully submit that, not only does the title vest at the date of the act, but it likewise attaches to the property thus ascertained or described at the same time, no further act being necessary to identify it.

In United States *vs.* the Southern Pacific Railroad, 146 U. S., 570, 594, the opinion quotes from St. Paul and Pacific R. R. Co. *vs.* Northern Pacific Railroad Co., 139 U. S., 1, 5, as follows: "The route not being at the time determined, the grant was in the nature of a float, and the title did not attach

to any specific sections until they were capable of identification ; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved," and this court added : " In view of this late and clear declaration, it would be a waste of time to attempt a re-examination of the questions, or a restatement of the reasons which have established these as the settled rules of law in respect to land grants, and made it so that the old common law rule as to the necessity of identification to the conveyance has not been controlling in determining the scope and effect of a Congressional land grant." See, also, Schulenberg *vs.* Harriman, 21 Wall., 44, 62.

In the second place, with respect to the use of words of grant, we respectfully submit that the word " give " in the Act of 1839 is equivalent to the word " grant."

In Rice *vs.* Railroad Co., 1 Black, 358, 378, where an Act of Congress granting certain lands to the then Territory of Minnesota was before the court, this court said: " But the word grant is not a technical word, like the word enfeoff."

In Pierson *vs.* Armstrong, 1 Iowa, 282, 393, the court say, " The words *dedi* and *concessi* are general words, and may amount to a grant, feoffment, gift, release, confirmation, surrender, etc."

" The word *dedi* operates as any kind of conveyance." Denn *vs.* Gifford, 1 N. J. L., 197, 198.

In Shove *et al. vs.* Pincke, 5 T. R., 124, 129, Lord Chief Justice Kenyon said, " It has never been held necessary that the word ' grant ' should be used in a grant ; it being sufficient if the intention to grant be manifest by the deed." And Buller, J., said " The thing conveyed is a reversion ; that is the subject of a grant ; and the words ' limit and appoint ' operate as a grant." And the case before the court was not a grant by the sovereign, but merely between private parties. And see Kent, C. J., in Frost *vs.* Raymond, 2 Caine, 188, 194.

Where Congress "relinquished" to the State of Iowa all the title which it retained in certain described lands, this court held in United States *vs.* Des Moines Navigation and Railway Co., 142 U. S., 510, 515, 529, that the resolution, though in terms merely a relinquishment, "also operated as an immediate transfer of title."

Finally, and conclusively upon this point, is respectfully submitted the case of Rutherford *vs.* Greene's Heirs, 2 Wheat., 196, 205, in which case this court, by Marshall, C. J., construing an act of the legislature of North Carolina, passed in 1782, said: "The 10th section enacts, 'that 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the Army, to be laid off by the aforesaid commissioners, as a mark of the high sense this State entertains of the extraordinary services of that brave and gallant officer.' This is the foundation of the title of the appellees. On the part of the appellant it is contended that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the State, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed, of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers. * * * * It has been said that, to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given,' so as to read 'shall be allotted for, and are hereby given to,' etc. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends in no degree on its containing the technical terms used in a conveyance. * * * It is clearly and unanimously the opinion of this court that the act of 1782 vested a title in General Greene to 25,000

acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title, and attached it to the land surveyed."

The objection of the learned court below that the provisions of the act in question were insufficient to vest title because of the supposed absence of a definite grantee is, it is submitted, equally untenable.

In City of Boston *vs.* Lecraw, 17 How., 426, 432-3, this court said: "By the common law of England, the right of littoral proprietors, bounding on public navigable waters, extended to high-water mark only. But by an ancient ordinance, usually denominated the Ordinance of 1641, sec. 3, it declared, 'that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided that such proprietors shall not by *this liberty* have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves, to other men's houses or lands.' This is the foundation of what may be called the common law of Massachusetts on this subject. By it, the grantee of land bounding on navigable water where the tide ebbs and flows, acquires the *legal right* and a *vested interest* in the soil of the shore between high and low water mark, and not a mere indulgence or gratuitous license, given without consideration, and revocable at the pleasure of the grantor." See, also, Austin *vs.* Carter, 1 Mass. Rep., 231.

The Supreme Court of Massachusetts, in Commonwealth *vs.* Alger, 7 Cush., 53, 72, passing upon the effect of this same ordinance, says: "We think it is, therefore, impossible, from this casual use of the word 'liberty' in the proviso, to infer that it was intended to give a gratuitous permission or license to the riparian proprietor to make a temporary or

casual use of the flats adjoining his upland ; and we think it was intended to declare a general rule of property, in regard to all real estate, bounded upon tide waters, annexing a new and additional right of soil in the shore, subject to the restrictions above mentioned."

These cases, we submit, apply with force to the present case, not only as to the meaning of the words of conveyance used, but, also, as to the question of definiteness of description, both of the grantee and of the subject of the grant. In every essential respect, we submit, these cases are entirely analogous to the one at bar, and, if correctly decided, must control it.

The provision before the court, embodied in the Code of Laws accompanying the Constitution of 1839, is, beyond doubt, the foundation of what, in the language of this court in Boston *vs.* Lecraw, *supra*, may be called the common law of Hawaii upon this subject. By it, the owner of lands adjoining the sea "acquires the *legal right* and a *vested interest* in the fishing grounds from the coral reef to the sea beach, and not a mere indulgence or gratuitous license, given without consideration, and revocable at the pleasure of the government." That provision was, undoubtedly, "intended to declare a general rule of property." The fact that the act which conferred these rights was the same act that, to use its own language, "takes the fishing grounds from those who now possess them," in connection with the further fact that the accompanying declaration of rights provided for protection to the persons and property of all the people, leads indubitably to the conclusion that some substantial right, and not a mere revocable license, was intended to be conferred. And this was unquestionably the intent and understanding of Congress, in Sec. 95 of the Organic Act ; for, otherwise, the saving of vested rights, and the provision for establishing them, contained in that section, would be meaningless and inoperative.

II.

But, in the second place, even if there were room for doubt as to whether the intention of the legislature as expressed in the Code of Laws of 1839, gave and confirmed a vested right in and to the fishery in question, the subsequent enactments of the legislature, we submit, have removed them.

Sec. II, of Art. V, Chap. VI., of the Act of 1846, sometimes referred to as the Act of 1845, provides: "The fishing grounds from the reefs, and, where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low-water mark, shall in law be considered the *private property* of the landlords whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries the said landholders shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth." A comparison of this enactment with the Massachusetts ordinance considered by this court in Boston *vs.* Lecraw, *supra*, will show how similar they are, the Hawaiian Act, however, being stronger, in that it, in express terms, declares that the fishing grounds in question "shall in law be considered the private property of the landlords whose lands, by ancient regulation, belong to the same."

Sec. III provides: "The landholders shall be considered in law to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands; and the tenants shall be at liberty to use *the fisheries of the landlords*, subject to the restrictions in this article imposed." (Laws of the Hawaiian Islands, vol. I., pp. 90–1.)

The ensuing provisions conferred upon the landlords the right to set apart for themselves one species or variety of fish natural to the fishery, and provided for public notice by proclamation of the species so reserved, etc., or, upon con-

sultation with their tenants, "in lieu of setting apart some peculiar fish to their exclusive use, as hereinbefore allowed, to prohibit during certain indicated months of the year all fishing of every description upon *their fisheries;* and, during the fishing season, to exact of each fisherman among their tenants one-third part of all the fish taken upon *their private fishing grounds.*"

It must be conceded that no rights are claimed by the plaintiff in error in this case which are not identical with those conferred by the act of 1846. Indeed, it was conceded in the court below, at p. 9 of defendant's brief, that "The exercise of rights in the fishery claimed here have been exercised under and pursuant to our statutory regulations;" so that we assume that there will be no question here, as there can be none on the Record, but that the plaintiff is invested with all the rights conferred by the statute to which reference has just been made.

The learned court below was of the opinion that the provision of the law declaring that the fishery "shall in law be considered the private property of the landlords," was without significance, that court declaring: "The phrase 'private property' used in the law can not mean more than the rights which the statute gave to the konohiki or landlord over the fishery, and such private property could not be said to be held by contract, or any covenant in the nature of a contract;" this conclusion of the learned court being exactly the reverse of that reached by this court in Boston *vs.* Lecraw, as of the principles and conclusions of the other authorities above cited. In addition, not only does the law in question declare that the fishing grounds "shall in law be considered the private property of the landlords," etc., but that said landholders "shall not be molested" in the possession of their said "private fisheries;" and, again," the tenants shall be at liberty to use *the fisheries of their landlords*, subject to the restrictions in this article imposed."

It is respectfully submitted that, even if this were a question of novel impression, unilluminated by any judicial construction by the Hawaiian courts, the act which declares the fishery rights to be, in law, the private property of the landlords, and which describes each of them as a "private fishery" and a "fishery of the landlord," unquestionably must be held to give to the landlord a vested property right.

The question, however, is further removed from the field of controversy by the construction placed upon the law by the Supreme Court of Hawaii in the case of Haalelea *vs.* Montgomery, 2 Haw., 62, 66, 70, 71, in the year 1858, a dozen years after the Act was passed, and nearly half a century before Congress passed the Organic Act, under which the present proceedings originated. In that case, the court, after quoting Secs. 2 and 3 of the Act of 1846 above set forth, said: "Under this statute, as we understand it, the entire fishing ground, lying between low-water mark and the outer edge of the coral reef, (or Kuanalu, as it is called in the Hawaiian version), along the seaward front of the Ahupuaa of 'Honouliuli,' was the private property of M. Kekauonohi, possessed and held by her as such, subject to the piscatorial rights of the tenants living on that Ahupuaa. * * * None of the rights of the piscary possessed by M Kekauonohi, as owner of the fishery, could have passed as a *mere appurtenance* to the piece of land conveyed to Isaac Montgomery. She could have transferred the fishery, or her right therein, only by express grant, *eo nomine*. Had she made a deed even of the whole Ahupuaa, by metes and bounds, not including the fishery, nor expressly naming it in the conveyance, it is doubtful if either the fishery or her rights therein would have passed to the grantee. * * * If any person who has acquired a kuleana on the Ahupuaa of 'Honouliuli' should sell and convey his land, or even a part of it, to another, a common right of piscary would pass to the grantee, as an appurtenance to the land. In that case it would not be necessary, we

apprehend, to mention the right of piscary in the convey ance—it would pass as an incident. (See Kent's Com. vol. 4, p. 517; Comyn's Digest, vol. 4, title Grant, E. 11). Here, we think, is the great distinction between the rights of the konohiki, and those of the tenant or occupant; for, while the former holds the fishery as his private property, the latter has only a right of piscary therein, as an incident to his tenancy. This marked distinction in their respective rights must create a corresponding difference in regard to the transfer of those rights."

Thus, practically contemporaneously with the passage of the Organic Act, the final and unmodified adjudication by the highest court of Hawaii upon the character of the landlord's rights in the fisheries, under the statute, holds unmistakably that he has a right of property—a vested right, of too important and positive a character to be transferable as "a mere appurtenance," while the rights of the tenants, being of an inferior character, would pass as an appurtenance, without express mention in the conveyance.

It is respectfully submitted that this decision, by the highest judicial tribunal of a foreign nation, upon a question undoubtedly purely local, is conclusive upon all the world; and that it must be presumed that Congress understood the effect and meaning thereof when Secs. 95 and 96 of the Organic Act were enacted by it. C. & P. Tel. Co. *vs.* Manning *et. al.*, 186 U. S., 238, 245.

"The exposition given by the highest tribunal of the State must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that,

when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it." Louisiana *vs.* Pillsbury, 105, U. S., 278, 294; Morley *vs.* Lake Shore Railway, 146 U. S., 162, 166. See, also, May *vs.* Tenney, 148 U. S., 60, 64.

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself." Louisiana *vs* Pillsbury, 105, U. S., p. 295, and citations.

The exposition of the Act of 1846, given by the Supreme Court of Hawaii in Haalelea *vs.* Montgomery. *supra*, having become a rule of property, under which the fishery right in controversy here was acquired, and was transmitted through the various channels shown by the Record, until it vested in the present plaintiff in error, it is respectfully submitted, becomes equally entitled to exemption from impairment by subsequent decisions as in the case of contracts referred to in the above citation.

In Elmendorf *vs.* Taylor, 10 Wheat., 153, 159, this court, speaking by Marshall, C. J., said: "This court has uniformly professed its disposition in cases depending upon the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts

of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute."

"It is an elementary principle that this court, in interpreting a State statute, will construe and apply it as settled by the court of last resort of the State, and will hence only form an independent judgment as to the meaning of the State law, when there is no binding construction of such State statute by the court of last resort of the State." Railroad Company *vs.* Trust Co., 173 U. S., 99, 107. See, also, Greene. *vs.* Lessee of Neal, 6 Pet., 291, 297.

Should not, then, the decision of the Supreme Court of Hawaii, rendered almost contemporaneously with the act in question, and in force at the time of the passage of the Organic Act—presumed to have been known to Congress, and to have entered into its contemplation and purpose in its enactment of that act, be followed upon this question?

The case of Haalelea *vs.* Montgomery was cited and relied upon in the opinion of the court below, for the proposition that the fishery right in question did not pass under the royal patent to Lota Kamehameha, under whom the plaintiff in error claims, because there were no words of express grant,—an error, we contend, into which the learned court fell from its failure to note the distinction between the case of grants between individuals and grants from the State or sovereignty, as noted *supra*. The court, curiously enough, seems wholly to have overlooked the crucial question presented in this case, namely, the decision that the landlord "holds the fishery as his private property," while his tenant's easement therein was only "an incident to his tenancy."

Of this case of Haalelea *vs.* Montgomery, the brief on behalf of the defendant in error, in the court below, said: "The result of that case has stood as the undisputed law of these Islands for nearly half a century, and, we submit, cannot now be shaken."

In construing statutes such as those now under consideration, namely, enactments made by and under a form of government essentially distinct and fundamentally different from our own, and which have stood undisputed for more than half a century, is it not right to lean toward a construction that will deal justly with those who have acquired property rights under them—always bearing in mind that we are not at liberty to consider them in the view of our own public policy, opposed as it is to exclusive rights of any kind, but that we are under the duty of placing ourselves as nearly as may be in the identical position occupied by the Government making the grant, at the date thereof, and considering its laws and its policies at that time?

In Mobile etc., R. R. *vs.* Tennessee, 153 U. S., 486, 502, this court declares: "Legislative contracts, especially, should be read in the light of the policy entertained, and the purposes sought to be accomplished, at the time they were made, rather than at a later period, when different ideas and theories may prevail. In Platt *vs.* Union Pacific Railroad, (99 U. S., 48, 64), Mr. Justice Strong expresses this proposition as follows 'There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * * * But, in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed; looking at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.'"

In Martin *vs.* Waddell, 16 Pet., 367, 411, reviewing the grant of New Jersey by Charles II. to the Duke of York, the court said: "We must not look merely to the strict technical meaning of the words of the letters-patent. The laws and institutions of England, the history of the times, the object of the charter, *the contemporaneous construction given to*

it, and *the usages under it*, for the century and more which has since elapsed, are all entitled to consideration and weight."

And we have here suggested another pertinent and very important rule of construction, namely, that great weight is to be given to contemporaneous construction.

"If there were any doubts with regard to the interpretation of the act of 1869, the construction placed upon it by the Land Department for eighteen years, under which construction these lands have been put upon the market and sold, would undoubtedly be entitled to considerable weight." United States *vs.* Union Pacific Railway, 148 U. S., 562, 572. Here, we have the construction of the court of last resort of Hawaii, as final and as conclusive in that country, at the time it was rendered, as are the decisions of this court with us, and under which construction these and similar fisheries have been put upon the market, and have passed to successive owners, for half a century.

"As early as 1803, it was held by this court, in Stuart *vs.* Laird, 1 Cranch, 299, 309, that a practical construction of the Constitution that the Justices of the Supreme Court had a right to sit as Circuit Judges, although not appointed as such, was not open to objection. 'It is sufficient to observe,' says the court, 'that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of a most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.' In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling." Schell's Executor *vs.* Fouche, 138 U. S., 562, 572.

After the adoption of the Constitution, and the passage

19389

of the Act of 1846, the King, in 1851, approved an act granting to the people the rights of piscary belonging to the government, in the following language: "All fishing grounds appertaining to any government land or otherwise belonging to the government, excepting only ponds, shall be, and are, hereby, forever, granted to the people for the free and equal use of all persons." (Session Laws, Hawaii, 1851, p. 23.) Had the fishery now in controversy been held by plaintiff in error under a mere license, revocable at pleasure, and if the fishery itself in any manner belonged to the government, it indisputably follows that this act operated as a revocation of any mere license to the landlord, and granted the fishery to the people, "for the free and equal use of all persons." Although half a century elapsed between this Act of the King and the passage of the Organic Act, no such claim was ever put forth, but, on the contrary, the right of the plaintiff and those under whom he claims, to the exclusive use and enjoyment of this fishery, which is equivalent to saying to the property therein, subject only to the common of piscary enjoyed by the tenants, was continuously conceded and acquiesced in by all the world.

The court below referred to an act passed in 1851, (Session Laws, Hawaii, 1851, p. 25,) providing, "No person who has bought, or who may hereafter buy, any government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person, resident in this kingdom, over any fishing ground not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the tabu of the minister of the interior." It does not appear that the court attached any importance to this act as affecting the rights of the plaintiff in error in this case; and it is very clear that the act is not capable of such a construction; because, in the first place, the fishing grounds of the plaintiff in error and

his predecessors in title, were "included in his title," for the ~~very~~ reason that the decision of the court in the case of Haalelea *vs.* Montgomery, recognizing that title in the landlords, was rendered seven years after this act was passed, and, of course, with full knowledge of it, and for the further reason that, as shown by the Record, the only tabu exercised in the fishery in question was exercised, not by the Minister of the Interior, but by the plaintiff in error and those under whom he claims. Sec. 2 of this same Act of 1851, accompanying and directly following the section in question, quoted by the court below, provides: "If that species of fish which has been tabooed by any konohiki shall go into the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall only be tabooed when caught within the bounds of the konohiki's private fishery"—thus clearly recognizing a vested interest in the konohiki or landlord to such private fishery.

Not only have we this long acquiescence by the state and the public in the right asserted by the plaintiff in error, but we have also a later explicit declaration by the legislature itself, in the Penal Code of 1859; which Code re-enacts the "private property" and other provisions of the Act of 1846 and the "public granting" clauses of the Act of 1851, as follows:

"Section 384. All fishing grounds appertaining to any government land, or otherwise belonging to the government, excepting only ponds, shall be, and are hereby forever granted to the people, for the free and equal use of all persons."

"Section 387. The fishing grounds from the reefs, and, where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low-water mark, shall, in law, be considered the private property of the konohikis, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the said

konohikis shall not be molested, except to the extent of the reservations and prohibitions hereinafter set forth.

"Section 388. The konohikis shall be considered in law to hold said private fisheries for the equal use of themselves, and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their konohikis, subject to the restrictions imposed by law.

"Section 389. The konohikis shall have power, each year, to set apart for themselves one given species or variety of fish natural to their respective fisheries, giving public notice, by *viva voce* proclamation, and by at least three written or printed notices posted in conspicuous places on the land, to their tenants and others residing on their lands, signifying the kind and description of fish which they have chosen to set apart for themselves.

"Section 390. The specific fish so set apart shall be exclusively for the use of the konohiki, if caught within the bounds of his fishery, and neither his tenants nor others shall be at liberty to appropriate such reserved fish to their private use, but, when caught, such reserved fish shall be the property of the konohiki, for which he shall be at liberty to sue and recover the value from any person appropriating the same."

"Section 392. It shall be competent to the konohikis, on consultation with the tenants of their lands, in lieu of setting apart some particular fish to their exclusive use, as hereinbefore allowed, to prohibit during certain months in the year all fishing upon their fisheries; and, during the fishing season, to exact of each fisherman among the tenants, one-third part of all the fish taken upon their private fishing grounds.

"Section 393. No person who has bought, or who may hereafter buy, any Government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person, resident in this kingdom, over any fishing ground not included in his title, although adjacent to said land.

"Section 394. If that species of fish which has been tabooed by any konohiki, shall go on to the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall be tabooed only when caught within the bounds of the konohiki's private fishery."

These provisions were all substantially re-enacted in the Penal Laws of 1897, chap. 97.

Consideration of the foregoing provisions seems conclusively to demonstrate that they may all stand together upon one hypothesis only, namely; that the fisheries claimed, which they declare "shall, in law, be considered the private property of the konohikis," that "the tenants shall be at liberty to use the fisheries of their konohikis, subject to the restrictions imposed by law," etc., etc., did not 'belong to the government,' but were 'included in the title of the konohikis or landlords'; and, so construed, further discussion of the subject becomes unnecessary.

Of the cases cited by counsel for defendant in the court below, but two, it is submitted, are even colorably relevant to the case at bar, namely: Pratt *vs.* Brown, 3 Wis., 603, 616, and Phipps *vs.* State, 22 Md., 380.

Of the first of them, it was argued below, "In Pratt *vs.* Brown, it was held that the right given by statute to mill owners to build dams and flood their neighbors' lands was not a vested right, but one which terminated with the repeal of the act." But this case cannot be regarded as a precedent here. It must rest upon its own peculiar facts, and upon that principle of the law of eminent domain upon which the case turned, namely, the principle which declares that title passes only when compensation is made. The court, at p. 616, *et seq.*, say: "In all the foregoing remarks, no reference has been had to cases in which the person whose lands have been taken under the law has proceeded to have his damages assessed, and received his compensation. Whether such proceeding on his part would

be construed into an assent, and assume the character of a contract which after legislation could not impair, we do not pretend to say. That question is not now before us. The consequences of the land owner accepting the gross sum, or the annual compensation assessed by the jury, are not now the subject of inquiry, for the reason that the plaintiffs in this case, nor their grantors, have ever taken any measures to have their damages assessed, nor, so far as appears in the Record, done any act from which their assent to the flowing of their land can be implied. The defendant stands here upon the naked authority which he claims to have derived by operation of law. We look upon his position precisely as though the government had appropriated the land of the plaintiffs during its pleasure, and constituted the defendant the occupier during the same period. Undoubtedly he has a vested right to the occupancy of the land as long as the government should see fit to continue its appropriation, and no longer. The effect of the enacting and repealing statutes is, that the government, through the agency of the mill owner, held the lands liable to seizure and appropriation for the period of ten years, or until the second day of January, 1850. From that time the public use ceased, and if the mill owner desired further occupany, he must derive his right thereto from contract with the owner, and not through the sovereign right of eminent domain."

It is accordingly apparent that the decision of the Wisconsin court turned upon the fact that the act relied upon by the defendant in that case was an act allowing him to take the property of another, namely, by overflowing it, without compensation; a question which, it is equally apparent, is in no wise presented by the case at bar.

With regard to the case of Phipps *vs.* State, 22 Md., 380, three observations are to made, namely:

(1) In the first place, the court was dealing only with Sec. 17 of Article 71 of the Code, which authorized "Any citizen

of any county bordering on the waters of this State" to "locate and appropriate in any of the waters thereof any area not exceeding one acre in extent for the purpose of depositing, bedding or sowing oysters or other shell fish." The section, as will be seen, does not confer any right appurtenant, incident or in any way connected with the ownership of any land, or property, of any description, but gives merely a personal privilege to any one happening to be a citizen of any county which borders on the waters of the State, to locate and appropriate an area in any of the waters of the State, not only not bordering upon any land owned by him, but not necessarily bordering on his county, for the purposes specified in the law.

Contrast this with the language of the Hawaiian Act of 1846: "The fishing grounds from the reefs, and, where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low-water mark, shall in law be considered the private property of the landlord."

(2) But, in the second place, if the language of the law of Maryland and of the Hawaiian law were identical; yet, the Maryland act having been construed to be a license, merely, in this case of Phipps *vs.* State, and the Hawaiian act having been construed by the Supreme Court of Hawaii, in the case of Haalelea *vs.* Montgomery, to give to the landlord "the fishery as his private property," requiring the inclusion of it by metes and bounds or other specifie description in order to pass title to it by deed, this court will construe the act in Maryland according to the construction of the Court of Appeals of that State, and the act in Hawaii according to the construction of the Supreme Court of that kingdom, as though they had been different acts. Louisiana *vs.* Pillsbury, 105 U. S., 278, 294; Morley *vs.* Lake Shore Railway, 146 U. S., 162, 166; May *vs.* Tenney, 148 U. S., 60, 64.

(3) In the third place, if the rule last cited be disregarded, and if the Hawaiian and the Maryland acts are not distinguishable in the facts and conditions to which they relate, so that this court is called upon to pass upon the relative accuracy or correctness of the two constructions, the case of Boston *vs.* Lecraw, *supra*, furnishes both precedent and authority for such decision.

III.

It is further submitted on behalf of the plaintiff in error that the right of property in the fishery claimed by him is sufficiently sustained by Royal Patent No. 7858, which, in granting to his predecessor in title the Ahupuaa of Moanlua, in the descriptive part of the patent, declares, "There is also attached to this land a fishing right in the adjoining sea, which is bounded as follows," thereupon describing the same by metes and bounds, with the same particularity as is observed in the description of the land embraced within the patent.

The objection on behalf of the defendant in error to this claim is that the patent does not employ words of conveyance which would be appropriate or necessary if the grant were one between private individuals. To this the plaintiff in error replies that, this being a grant by the government, and the intention to transfer the fishery being evident, effect is to be given that intention, under the authorities mentioned *supra*, at pp. 6–12. * * It is further to be noted, with reference to this objection, that, unless the intention to pass a vested right or property in and to the fishery is to be derived from the words used in reference to it in the patent, no force or meaning can be given to those words. If they are to be construed as conveying, merely, information that a fishing ground adjoined the land, without any intent to confer any right therein upon the grantee, of what effect are they?

"There is also attached to this land a fishing right in the adjoining sea." The grantor thus declaring that, in his contemplation and within his intent, the fishery right was "attached" to the land granted, is there room for any reasonable doubt of the intent that both land and fishery were to pass to and vest in the grantee?

The remaining objection to the claim of the plaintiff in error under the patent is that, the Board of Commissioners to Quiet Land Titles, created by the Hawaiian Act of 1846, Chap. VII. Art. IV, not having awarded this fishery to those under whom the plaintiff in error claims, all private rights therein are barred and forever destroyed.

The Act in question is entitled, "Of the Board of Commissioners to Quiet Land Titles," and its provisions, so far as they concern the question now presented, are as follows:

"Section I. His majesty shall appoint through the Minister of the Interior, and upon consultation with the privy council, five commissioners, one of whom shall be the attorney general of this kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act; the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the Minister of the Interior and upon the applicant."

"Section VII. The decisions of said board shall be in accordance with the principles established by the Civil Code of this kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy--primogeniture and rights of adoption; which decisions, being of a majority in number of said board, shall be only subject to appeal to the supreme court, as prescribed in the act to organize the judiciary, and when such appeal shall not have been taken, they shall be final.

"Section VIII. All claims to land, against the Hawaiian government, which are not presented to said board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article shall be deemed to be invalid, and shall be forever barred in law, unless the claimant be absent from this kingdom, and have no representative therein."

It is entirely evident from the language of this act that the Board in question was created to determine the validity of claims by individuals to public *lands*, which claims had been *acquired prior to the date of the act.*

Not only so, but the only reference to piscary rights, contained in the act is the provision that the decision of the Board, in passing upon the disputed claims specified, should be in accordance with the principles established by the Civil Code of the kingdom, in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, etc., etc. Not only does the title of the act indicate that the powers of the board were expressly restricted to 'quieting land titles,' but the act in its entirety shows the same restrictive legislative intent.

Not only does the act disclose no purpose to require that all persons claiming fishing rights, like those asserted by the plaintiff in error in the present case, whether acquired before or after the year 1846, and whether in dispute or not, should present them to this Board of Commissioners, but the Board, itself, contemporaneously declared that it had no such power. Thus, in Akeni *vs.* Ka Mau, 5 Haw., 91, cited below to show that the Board did award such rights, the opinion of the Boundary Commissioner, which the court affirmed, on the contrary, distinctly declares: "I find in repeated instances that the Board declined to award and define piscary rights, leaving parties to their rights under general statutes, and no instances of a contrary practice are shown to me."

IV.

In the last place, it is submitted, the exclusive claim and possession of the fishery right in controversy, by the plaintiff in error and those under whom he claims, during the forty years shown by the Record, are sufficient to create the presumption of a grant, even if his claims upon all the other grounds above set forth did not exist.

If the Code of 1839 and the Act of 1846 were held to create a license, merely, such license would have been revoked by the Act of 1851, *supra*, p. 20-1. Yet, the plaintiff and his predecessors in title are shown to have held, claimed and exercised the exclusive right to the use and enjoyment of the fishery, subject only to certain privileges of common in piscary permitted their tenants, since the year 1862, which right was acquiesced in by the Government.

Upon this subject, in the case of the United States *vs.* Chaves, 159 U. S., 452, 463, where a vested right or title was claimed in land situated in New Mexico, arising under the Spanish and Mexican governments prior to the Mexican War, this court said, "The counsel for the Government, indeed, contend that the Court of Private Land Claims, and this court, have no power to presume a grant upon proof of long continued possession only; that their power is confined to confirming grants lawfully and regularly derived from Spain and Mexico. It is scarcely necessary for us to consider such a question, because, as we have seen, there is ample evidence from which to find that these settlers were put in juridical possession under a grant from the Governor of New Mexico, who, under the laws then in force, had authority to make the grant. However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case (from 1833 to 1892). Without going at length into the subject, it may be safely said that by the weight of authority, as well as the prepon-

derance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law. (Citations.) * * * * * * * Thus, also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim *nullum tempus occurrit regi;* yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev., Sec. 45."

Upon consideration of the foregoing principles, authorities and facts, it is respectfully submitted that the right of property claimed by the plaintiff in error in the fishery is sustained,

(1) By the code of Laws of 1839,

(2) By the Act of 1846,

(3) By the re-enactment of the provisions above named in the Penal Code of 1859,

(4) By the royal patent, No. 7858, and,

(5) By a peaceable, undisputed enjoyment and exercise of the property rights claimed for a period creating the presumption of a grant.

FRANCIS M. HATCH,
REUBEN D. SILLIMAN,
Attorneys for Plaintiff in Error.

J. J. DARLINGTON,
Of Counsel.